Supreme Court, U.S.
FILED
031702 JUN 21 2004

No.

In the Supreme Court of the United States

OLIVER MANUEL
Petitioner,

v.

SANDERSON FARMS, INC, PROCESSING DIVISION,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

GAINES WEST
Counsel of Record
WEST, WEBB, ALLBRITTON & GENTRY, P.C.
1515 EMERALD PLAZA
COLLEGE STATION, TEXAS 77845-1515
(979) 694-7000 - telephone
(979) 694-8000 - facsimile
Counsel for Petitioner

Riverside Printing, L.L.C., 4939 Tchoupitoulas, N. O., LA 70115, (504) 897-5000

QUESTION PRESENTED

Will the Court of Appeals for the Fifth Circuit be allowed to ignore this Court's mandate in *Swierkiewicz v. Sorema* that the ordinary rules for assessing the sufficiency of a complaint apply to Title VII claims?

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The opinion of the Trial Court has not been selected for publication and is reproduced in Appendix A, at A-1 to A-4. Further, the opinion of the Fifth Circuit has not been selected for publication and is reproduced in Appendix B, at A-5 to A-12. The Fifth Circuit's order denying the petition for rehearing is unreported and is reproduced in Appendix C, at A-13 to A-14.

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit was issued on February 6, 2004. A timely petition for rehearing was denied by that Court on March 25, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(l).

STATUTE INVOLVED

Title VII of the Civil Rights Act of 1964 provides that it "shall be an unlawful employment practice for an employer ... to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a) (1994).

STATEMENT OF THE CASE

I. The Proceedings Below

Oliver Manuel filed suit against Sanderson Farms, Inc. (Processing Division) ("Sanderson Farms"), complaining that he suffered a hostile work environment and was

ultimately terminated on account of his race and thus pleading claims under Texas and Federal anti-discrimination laws, namely the Texas Commission on Human Rights Act ("TCHRA") and Title VII. Shortly after Manuel filed his suit, Sanderson Farms filed a motion for summary judgment. Sanderson Farms argued both that Manuel's state law claims were time barred and that he could not establish his racial discrimination and hostile work environment claims as a matter of law. Finding that Manuel's claims were time barred under federal law and that they failed as a matter of law, the trial court granted summary judgment in favor of Sanderson Farms and dismissed all of Manuel's claims. (App. A).

Manuel appealed the trial court's judgment. The Court of Appeals for the Fifth Circuit affirmed the trial court on different grounds, holding that Manuel's TCHRA claims were time-barred under state law. (App. B at A-12). The panel opinion completely failed to consider Manuel's Title VII claims. (App. B). Accordingly, Manuel petitioned the panel for rehearing, urging the panel to consider the Title VII claims that were pleaded in his Original Petition. The panel denied Manuel's Petition for Rehearing. (App. C).

II. Material Facts

When Manuel began working for Sanderson Farms as the Superintendent of the Shipping/Preprice/Chilling Department, he was the only African American superintendent employed with Sanderson Farms at the Bryan, Texas processing facility. Manuel was hired to work the second shift, which typically operates from 6:00 p.m. to 2:30 a.m., by David Jarrett, the manager of the Shipping/Preprice/Chilling Department.

Throughout Manuel's employment with Sanderson Farms, discussions transpired between Manuel and Jarrett regarding performance, production, shift time and duration issues. Many of these discussions involved the fact that Manuel was required to work longer hours, on what was known to be the most difficult shift, than his Caucasian counterparts on the first and third shifts. Sanderson Farms attempted to justify the longer hours to Manuel by stating that the first and third shifts involved different responsibilities and functions. Jarrett informed Manuel that he would attempt to alleviate some of the problems by adjusting Manuel's schedule or making personnel changes, but this never occurred. Manuel was also told that he needed to stay at work until his shift finished all its work, which was often after 2:30 a.m. and long after the second shift should have been complete. Manuel additionally encountered problems with the first shift not finishing its work, resulting in additional work for the second shift and requiring the second shift to compensate for the first shift's failure to complete its work. Consequently, this made Manuel's job more difficult and longer hours were necessary to complete the work first shift left behind, as well as the routine duties of the second shift.

On July 19, 2001, Manuel was terminated from his position with Sanderson Farms. Manuel filed a Charge of Discrimination with the Texas Commission on Human Rights ("TCHR") and concurrently filed with the Equal Employment Opportunity Commission ("EEOC") on February 20, 2002. The TCHR issued its right to sue letter on September 26, 2002. On October 7, 2002, the EEOC issued a right to sue letter to Manuel.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's Opinion Contravenes This Court's Holding In *Swierkiewicz v. Sorema By* Implicitly Finding That Manuel Had Not Stated A Claim Under Title VII Even Though His Original Petition Alleged Facts Upon Which Relief Can Be Granted

The Court of Appeals for the Fifth Circuit has invented yet another effective tool to deny relief to Title VII plaintiffs–entirely ignore their well-pleaded complaints. Despite the fact that Manuel plead claims for discrimination under both state law and Title VII, the Fifth Circuit affirmed the dismissal of his entire case on the ground that his state claims were time-barred. (App. B at A-12) By so doing, the Fifth Circuit refused to consider Manuel's well-pleaded Title VII claims.

Recently, this Court reversed the Second Circuit, because that Circuit had applied a heightened pleading requirement to Title VII cases. *Swierkiewicz v. Sorema,* 534 U.S. 506 (2002). This Court stressed that the ordinary rules for assessing the sufficiency of a complaint apply equally to Title VII cases. *Id.* at 511. Because the Fifth Circuit ignored Manuel's well-pleaded Title VII claim, that Circuit has applied a heightened pleading requirement to Title VII claims. This Court should review the Fifth Circuit's decision to ensure that other Circuits obey this Court's mandate in *Swierkiewicz v. Sorema.*

The familiar well-pleaded complaint rule states that a plaintiff has pleaded a cause of action if the complaint

alleges facts upon which relief can be granted, even though the complaint does not correctly categorize the legal theory. *St. Paul Mercury Ins. Co. v. Williamson,* 224 F.3d 425, 434 (5th Cir. 2000). Nearly all of the United States Courts of Appeals have adopted this rule.[1] In fact, this rule applies to all civil actions in federal court, including Manuel's Original Petition that was filed in a Texas trial court and removed to the Southern District of Texas. *See Swierkiewicz* 534 U.S. at 513. Manuel's Original Petition alleged facts upon which relief can be granted under Title VII based on two distinct theories: racial discrimination and hostile work environment. (App. D).

This Court has recently set out the pleading requirements for a racial discrimination claim under Title VII. *Swierkiewicz,* 534 U.S. at 514. Specifically, the plaintiff must allege that the defendant took an adverse employment action on account of the plaintiff's race. *Id.* Here, Manuel has alleged facts upon which relief can be granted under Title VII for racial discrimination. His Original Petition alleges that Sanderson Farms paid him a lower salary and fired him on account of his race. (App. D at A-17 to A-19). Accordingly, he has alleged a claim for racial discrimination under Title VII. *Williamson,* 224 F.3d at 434.

Likewise, the pleading requirements for a hostile work environment claim under Title VII are clear. *See Harris*

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[1] *See e.g. Bessette v. Avco Fin. Serv.,* 230 F.3d 439, 446 (1st Cir. 2000); *Simonton v. Runyon,* 232 F.3d 33, 36-37 (2nd Cir. 2000); *Bechtel v. Robinson,* 886 F.2d 664, 649 n.9 (3rd Cir. 1989); *New Amsterdam Cas. Co., v. Waller,* 323 F.2d 20, 24-25 (4thCir. 1963); *Gean v. Hattaway,* 330 F.3d 758, 765 (6th Cir. 2003); *Kennedy v. Nat'l Juvenile Detention Ass'n,* 187 F.3d 690, 695 (7th Cir. 1999); *Gen. Dynamics Corp. v. United States,* 139 F.3d 1280, 1283 (9th Cir. 1998); *Evans v. McClain of Georgia, Inc.,* 131 F.3d 957, 964 n.2 (11th Cir. 1997)

v. Forklift Sys., Inc., 510 U.S. 17 (1993). The plaintiff must allege that a hostile work environment existed that interfered with the plaintiff's job performance. *Id.* at 21-22. Again, Manuel's Original Petition alleges facts upon which relief can be granted under Title VII for hostile work environment. Manuel's Original Petition alleges that Sanderson Farms "created an unlawful and hostile work environment toward Manuel by regularly forcing him to work harder and longer hours while being paid less than his White counterparts." (App. D at A-19). The Petition continues, "The acts of Sanderson Farms caused Manuel humiliation and interfered with his ability to perform his duties." *Id.* Therefore, Manuel has stated a claim for hostile work environment under Title VII. *Williamson,* 224 F.3d at 434.

This Court, in rebuttal, will likely hear Sanderson Farms complain that Manuel's Original Petition does not give fair notice of his Title VII claims. Sanderson Farms will argue that Manuel's Original Petition does not mention Title VII. The fact remains, however, that the Federal Courts of Appeals have consistently held that a plaintiff need not correctly name the legal theory that he relies upon, so long as the complaint alleges facts upon which relief can be granted. *See e.g. Williamson,* 224 F.3d at 434-35 (holding that the words "malicious prosecution" were not required to state a claim for this tort); *Bassette v. Avco Fin. Serv.*, 230 F.3d. 439, 446 (1st Cir. 2000). It is simply inconsequential whether Manuel used the words "Title VII," because his Original Petition alleges facts upon which relief can be granted under Title VII. *Williamson,* 224 F.3d at 434-35

Furthermore, the fact that Manuel's Original Petition cites the TCHRA as the basis of his claims does not affect the

viability of his Title VII claims. After all, a plaintiff who improperly categorizes his legal theory still states a claim if the complaint alleges facts upon which relief can be granted. *See e.g. Williamson,* 224 F.3d at 434. And Manuel has alleged facts upon which relief can be granted under Title VII.

Sanderson Farms could have easily remedied any alleged confusion about Manuel's legal theories by moving for a more definite statement under Rule 12(e). *See Swierkiewicz,* 534 U.S. at 514. This procedure would have been especially helpful as to Manuel's claim for hostile work environment, because Manuel's Original Petition does not specify whether the claim is under the TCHRA, Title VII, or both. (App. D at A-19). After all, the notice pleading system is designed to allow flexibility in pretrial procedure so that a defendant's primary weapon to clarify the plaintiff's pleadings is self-help. *Swierkiewicz* 534 U.S. at 512-13. Manuel should not be held responsible for Sanderson Farms' failure to seek a more definite statement.

Despite the fact that Manuel had stated claims based on Title VII, the Fifth Circuit ignored these claims and silently applied a heightened pleading requirement. Thus, the Fifth Circuit has neglected this Court's directive to apply ordinary rules of assessing pleadings to Title VII claims. This Court should enforce its decision in *Swierkiewicz v. Sorema.*

II. **The Question Presented is Important**

The Fifth Circuit's opinion places Title VII plaintiffs in a bind that notice pleading is intended to prevent. Many states, including Texas, have adopted anti-discrimination laws that mirror Title VII. *See e.g. Specialty Retailers, Inc. v.*

DeMoranville, 933 S.W.2d 490, 492 (Tex. 1996) (discussing the TCHRA). Consequently, the same factual allegations in a complaint may often support a claim under both state law and Title VII. Nearly unanimous federal precedent simply requires a plaintiff to plead facts that would support his claims, so a plaintiff need not identify Title VII as the basis for his suit. But the Fifth Circuit requires more.

If this Court allows the Fifth Circuit's decision to stand, Title VII plaintiffs will be required to meet a heightened pleading requirement simply to receive a federal court's attention. In effect, the Fifth Circuit has used a heightened pleading requirement to dilute this Nation's clearly voiced public policy to end discrimination. Title VII plaintiffs will not receive the same consideration of their pleadings as the vast majority of other plaintiffs. Essentially, the Fifth Circuit has created a trap for the unwary plaintiff who pleads both state and Title VII claims. This Court previously overturned a similar trap imposed by the Second Circuit, and it must now do so with respect to the Fifth Circuit. The Fifth Circuit's apparent animosity to Title VII complaints should not be tolerated by this Court.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted to insure that the Fifth Circuit applies the same pleading requirements to Title VII plaintiffs as to nearly all other plaintiffs.

Respectfully submitted,

Gaines West
Counsel of Record
WEST, WEBB, ALLBRITTON
& GENTRY, P.C.
1515 Emerald Plaza
College Station, Texas 77845-1515
(979) 694-7000 - telephone
(979) 694-8000 - facsimile

Attorneys For Petitioner,
Oliver Manuel

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

OLIVER MANUEL,	§	
	§	
Plaintiff,	§	
	§	
versus	§	CIVIL ACTION
	§	H-02-4837
SANDERSON FARMS, INC.,	§	
	§	
Defendant.	§	

JUN 04 2003

Opinion on Summary Judgment

I. *Introduction.*

Oliver Manuel sues, claiming hostility at work and discriminatory discharge from his job as a shift superintendent. His claims fail because they are late and baseless.

2. Background.

Sanderson Farms runs a chicken processing plant. Oliver Manuel was the superintendent of the shipping and chilling department there for the second shift from 6:00 p.m. until 2:30 a.m.

Manuel claims that because the first shift did not complete its work it put his shift behind schedule, requiring him to work longer and harder hours than the other shifts. David Jarrett, his manager, required him to stay until he finished all the work; he was not allowed to leave the work for the third shift.

When Sanderson Farms hired Manuel, he was the only black superintendent at the plant. He claims that Sanderson Farms required him to work harder and longer hours for less pay.

In July 2001 as a matter of ordinary operations, he complained to Jarrett about having to compensate for the earlier shift's inefficiencies. Jarrett told him that he had to stay until his shift completed all its responsibilities, even if it meant working late. Several days later, Jarrett came to the plant at midnight and discovered that Manuel had left before his shift was over. Jarrett fired Manuel the next day.

In February 2002,Manuel filed a claim with the Texas Commission on Human Rights, arguing discrimination and hostile work environment. In September the commission dismissed it and issued a right-to-sue letter. In November Manuel sued Sanderson Farms in state court. Sanderson Farms removed it.

3. Limitations.

Manuel was fired on july 19, 2001. The Texas Commission on Human Rights dismissed his complaint on September 26, 2002, giving Manuel until October 26 to file his claim. Manuel did not file until November 22; that was

27 days too late. Federal law requires Manuel to file a claim within 30 days after the state agency terminates its proceedings. *See* 42 U.S.C.S. § 2000e-5(e).

4. Merits,

Even if Manuel had filed his claim on time, it would have failed. Manuel believes that Jarrett fired him because he was black, His belief contradicts the facts. Jarrett hired Manuel. Jarrett did not fire him when he was charged with sexual harassment at work. Jarrett recommended him for a raise. Jarrett ordered him to stay at work until the end of his shift. Jarrett did fire Manuel, but only when he discovered Manuel had left early in direct violation of an order. Manuel has not shown anything that suggests Jarrett based his decision on race. Manuel offers nothing to indicate that Sanderson Farms fired him because of his race rather than because he left early.

Regarding his hostility claim, Manuel states that Sanderson Farms harassed and humiliated him by making him work longer and harder hours for less pay than the white superintendents. He does not establish that their shifts were similar to his. The second shift's responsibilities differed from those of the first and third shifts. The second shifts production was lower than that of the first shift. Sanderson Farms paid Manuel more than they paid the first shift superintendent. The facts are the opposite of Manuel's abstract subjective belief.

Manuel offers no evidence of harassment or humiliation. He has not described racial acts or comments. Although he knew of Sanderson Farms' racial-harassment complaint

because he refused to complete his shift and responsibilities, not because he was black.

5. Conclusion.

Manuel's hostile work environment and discriminatory discharge claims fail. He will recover nothing from Sanderson Farms, Incorporated.

Signed June 3, 2003, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District judge

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 03-20663

OLIVER MANUEL,

Plaintiff - Appellant,

versus

SANDERSON FARMS INC.,
Processing Division

Defendant - Appellee.

FILED
February 6, 2004

Appeal from the United States District Court
for the Southern District of Texas, Houston Division
(No. 02-CV-4837)

BEFORE HIGGINBOTHAM, SMITH, and WIENER
Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant Oliver Manuel appeals the district court's grant of summary judgment in favor of his former employer, Defendant-Appellee Sanderson Farms, Inc. ("Sanderson Farms"), dismissing his Texas state law racial discrimination claims. We affirm, albeit for different reasons.[1]

I. FACTS AND PROCEEDINGS

Manuel filed suit in the County Court of Law No. 2 of Brazos County, Texas against Sanderson Farms, alleging discriminatory discharge and hostile work environment claims under the Texas[2] Commission on Human Rights Act ("TCHRA") . Sanderson Farms had hired Manuel in April 2000 as one of three superintendents at its poultry processing plant in Bryan, Texas. Each superintendent was in charge of one of the plant's three shifts. Manuel, a black male, was hired as superintendent of the second shift. Brian Otto and Ed Cammack, both white males, were superintendents of the first and third shifts, respectively.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] See S&W Enters., L.L.C. v. SouthTrust Bank of Ala., NA, 315 F.3d 533, 537-38 (5th Cir. 2003) ("Summary judgment must be affirmed if it is sustainable on any legal ground in the record, ... and it may be affirmed on grounds stated or not stated by the district court.")(cites omitted).

[2] TEX. LABOR CODE ANN. § 21.001, et seq. (Vernon 1996).

The second shift operated from 6:00 p.m. to 2:30 a.m., but Manuel would occasionally leave his shift early. On July 10, 2001, Manuel's supervisor, David Jarrett, instructed Manuel that, from that day on, he would be required to stay until the second shift had ended. (Although Jarrett did not give similar instructions to Otto and Cammack, neither does Manuel contest the record evidence that Otto and Cammack had no history of early departure.) The following week, Jarrett arrived at the plant around midnight and discovered that Manuel had left. Jarrett promptly recommended to Sanderson Farms' Division Manager, Eric Erickson, that Manuel's employment be terminated because of his poor performance and his failure to follow Jarrett's directive that he remain at work until the end of his shift. Erickson agreed with Jarrett's recommendation and, on July 19, 2001, informed Manuel that his employment at Sanderson Farms would be terminated.[3]

On February 20, 2002, more than 200 days after being informed of his discharge, Manuel filed a charge of discrimination with the Texas Commission on Human Rights ("the Commission") and with the EEOC. The Commission issued

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[3] Neither side disputes that the date Manuel was unequivocally informed that his employment at Sanderson Farms would be terminated, and not the date of his actual termination, triggers the 180 day time limit for filing his complaint with the Texas Commission on Human Rights. See TEXAS LABOR CODE ANN. § 21.202 (Vernon 1996); see also Specialty Retailers, Inc. v. DeMoranville, 933 S.W. 2d 490, 492-93 (Tex. 1996) ("[t] he limitations period begins when the employee is informed of the allegedly discriminatory employment decision, not when that decision comes to fruition") (citing Delaware State College v. Ricks, 449 U.S. 250, 258 (1980)).

Manuel a right to sue letter on September 26, 2002.[4] Manuel filed suit in state court within 60 days after receiving the Commission's letter, as required by Texas Labor Code Annotated section 21.254.[5] His complaint asserted only state law causes of action.

Sanderson Farms removed the case to federal court on the basis of diversity, and, following an expedited discovery schedule, moved for summary judgment on Manuel's claims. The district court granted Sanderson Farms's motion in June 2003. In its stated reasons, the court said that it found Manuel's claims time-barred under federal law, and, alternatively, that he had failed to establish genuine issues of material fact with regards to the merits of both his hostile work environment and discriminatory discharge claims. Manuel timely appealed.

II. ANALYSIS

A. Standard of Review

We review de novo a grant of summary judgment.[6]

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[4] The EEOC issued Manuel a right to sue letter on October 7, 2002.

[5] TEX. LABOR CODE ANN. § 21.254 (Vernon 1996) ("Within 60 days after the date the right to file a civil action is received, the complainant may bring a civil action against the respondent.").

[6] See Conserv Ltd. Liability Corp. v. Southwestern Bell Telephone Co., 350 F.3d 482, 486 (5th Cir. 2003)(cites omitted).

B. Time Bar

The district court held Manuel's claims to be time-barred under 42 U.S.C.S. § 2000e-5(e), because Manuel did not file suit within 30 days following receipt of his right to sue letter from the Commission.[7] Section 2000e-5(e) provides, in pertinent part, that an aggrieved party who has filed a charge of discrimination with a state or local agency, such as the Commission, has until the earlier of 300 days after the date of the alleged unlawful employment practice, or 30 days after the date on which he receives notice that the state agency has terminated its proceedings in which to file an EEOC charge.[8] As Manuel correctly points out, the district court erred in applying section 2000e-5(e), both because that provision controls the time for filing an EEOC charge and not the time for filing suit, and because the TCHRA, rather than federal law, controls whether his claims were timely filed.

Sanderson Farms concedes that the district court erred in applying § 2000e-5(e) but argues that Manuel's claims are time-barred nevertheless under the applicable limitations provision, section 21.202 of the TCHRA. That section requires a complainant to file a charge of discrimination with the Commission within 180 days following the date on which the alleged unlawful employment practice occurred, and directs the Commission to dismiss a late filed complaint

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[7] See 42 U.S.C.S. § 2000e-5(e)(Supp. 2003).

[8] See id.

as untimely.[9] The Texas Supreme Court has held that "[t]his time limit is mandatory and jurisdictional."[10] Sanderson Farms argues that, because Manuel waited until February 20, 2002 - well over 180 days after the date on which he was informed of his termination - to file his complaint with the Commission, his claims are time-barred under section 21.202.

Manuel responds, relying on a state intermediate appellate court case, Gorges Foodservice, Inc. v. Huerta,[11] that his receipt of the Commission's right to sue letter creates a presumption that his complaint was filed timely. His reliance is misplaced: Gorges held only that, in the absence of any evidence to the contrary, a jury could infer from the plaintiff's receipt of the Commission's right to sue letter that

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[9] See TEX. LABOR CODE ANN. § 21.202 (Vernon 1996) Section 21.202 provides:

(a) A complaint under this subchapter must be filed not later than the 180th day after the date the alleged unlawful employment practice occurred.

(b) The commission shall dismiss an untimely complaint. Id.

[10] Specialty Retailers, Inc. v. DeMoranville, 933 S.W.2d 490, 492 (Tex. 1996); see also Texas Parks & Wildlife Dept. v. Dearing, - S.W.3d -, 2004 WL 35543, at *4 (Tex. App. - Austin 2004, no pet. h.) ("[a] complaint with the Commission must be filed no later than 180 days after the alleged unlawful employment practice occurred"); Cooper-Day v. RME Petroleum Co., 121 S.W.3d 78, 83 (Tex. App. – Fort Worth 2003, pet. filed)("[f]ailure to timely file an administrative complaint [under Section 21.202] deprives Texas trial courts of subject matter jurisdiction").

[11] 964 S.W.2d 656 (Tex. App. - Corpus Christi 1997, pet. withdrawn).

his complaint was timely; [12] it did not hold that issuance of a right to sue letter creates a "presumption" of timeliness. Additionally, at least one Texas appellate court that addressed this precise point held that issuance of a right to sue letter from the Commission cannot confer subject matter jurisdiction over a plaintiff's complaint when the plaintiff has failed to file his charge with the Commission within 180 days after the alleged adverse employment action, as required by section 21.202.[13] Because it is undisputed that Manuel did not file his charge with the Commission until more than 180 days had elapsed following the alleged act of employment discrimination, his claims are time-barred under the TCHRA. As such, the district court lacked subject matter jurisdiction over his action.[14]

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[12] See id. at 664 ("[w]e hold . . . that the jury could have rationally inferred that Huerta's complaint was timely filed from the Commission's action in sending him a 'notice of right to file civil action' letter rather than dismissing his complaint pursuant to 21.202 of the Labor Code").

[13] Guevara v. H.E. Butt Grocery Co., 82 S.W.3d 550 (Tex. App. -San Antonio 2002, pet. denied); see also Subaru of America, Inc. v. David McDavid Nissan, Inc., 84 S.W.3d 212, 220 (Tex. 2002)("[c]ourts will not imply additional authority to [administrative] agencies, nor may agencies create for themselves any excess powers")

[14] See Jones v. Grinnell Corp., 235 F.3d 972, 974 (5th Cir. 2001) (" [i]f a complainant fails to exhaust his state administrative remedies, the Texas Human Rights Act jurisdictionally bars this court from hearing the case regardless of equitable and policy concerns")(cites omitted).

III. CONCLUSION

We affirm the district court's grant of summary judgment. Because we hold that Manuel's claims were time-barred, and affirm the dismissal of his action with prejudice on that ground, we do not reach the merits of his case.

AFFIRMED.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 03-20663

OLIVER MANUEL,

Plaintiff - Appellant,

versus

SANDERSON FARMS INC.,
Processing Division

Defendant - Appellee.

FILED
MAR 25, 2004

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

Before HIGGINBOTHAM, SMITH, and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ illegible
United States Circuit Judge
REHG-2

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

OLIVER MANUEL, Plaintiff, vs. SANDERSON FARMS, INC. (PROCESSING DIVISION), Defendant.	Civil Action No. H-02-4837

PLAINTIFF'S FIRST AMENDED COMPLAINT AND JURY DEMAND

TO THE HONORABLE JUDGE LYNN N. HUGHES:

NOW COMES, OLIVER MANUEL, and files this First Amended Complaint and Jury Demand against SANDERSON FARMS, INC. (Processing Division), pursuant to the Court's Order dated January 9, 2003, and for cause of action would show the Court as follows:

I.
Parties

1 . Plaintiff, OLIVER MANUEL ("Manuel"), is an

individual who is a citizen of the State of George and a resident of Cobb County, Georgia.

2. Defendant, SANDERSON FARMS, INC. (Processing Division) ("Processing Division"), is a corporation incorporated under the laws of the State of Mississippi. Processing Division has its principal place of business in the State of Mississippi, but conducts business in the State of Texas and has a processing facility located in Bryan, Brazos County, Texas. By agreement counsel for Processing Division, Jeffrey C. Londa, accepted service for Processing Division effective December 20, 2002.

II.

Jurisdiction and Venue

3. Manuel does not concede that this Court has jurisdiction over this lawsuit. However, this matter is before this Court pursuant to Processing Division's Notice of Removal filed on December 18, 2002, alleging that this Court has original jurisdiction pursuant to 28 U.S.C. §1332(a)(1) and (c)(1) based on diversity of citizenship of the parties and that the matter in controversy is in excess of $75,000.00. Thus, Processing Division removed this case pursuant to 28 U.S.C. §1441.

4. In his Original Petition and Jury Demand filed in County Court at Law No. Two (2) in Brazos County, Texas, on November 22, 2002, Plaintiff alleged only state causes of action under the Texas Commission on Human Rights Act ("TCHRA') for race discrimination and hostile work environment.

III.
Jury Demand

5. Plaintiff demands trial by jury on all issues pursuant to Rule 38 of the Federal Rules of Civil Procedure.

IV.
Facts

6. Manuel, an African American male, was employed by Processing Division. Manuel was discriminated against based upon his race.

7. Manuel commenced working for Processing Division on April 24, 2000. Manuel was terminated by Processing Division on July 19, 2001.

8. While employed by Processing Division, Manuel held the position of Superintendent Shipping/ Preprice/Chilling Department for the second shift from 6:00 o'clock P.M. to 2:30 o'clock A.M.

9. At the time of Manuel's termination, he was the only African American Superintendent employed by Processing Division at the Bryan, Texas processing facility.

10. Manuel was required by Processing Division to work harder and longer hours than similarly situated White employees.

11. Manuel was paid less than similarly situated White employees by Processing Division.

12. Because Manuel complained to Processing Division regarding his unfair employment situation, he was terminated.

V.

State Court Administrative Prerequisites Satisfied

13. Manuel timely filed a Charge of Discrimination with the Texas Commission on Human Rights ("TCHR").

14. Manuel's timely filed Charge of Discrimination with the TCHR is attached hereto as Exhibit "1."

15. Manuel's Right to Sue Letter from the TCHR is attached hereto as Exhibit "2."

16. This suit is filed within 60 days after receipt of the Right to Sue Letter from TCHR, thus, this suit is timely filed.

VI.

Causes of Action

A. **Racial Discrimination**

17. Manuel incorporates all other provisions of this pleading by reference and incorporates them herein for all purposes.

18. Processing Division has violated Chapter 21

of the Texas Labor Code by discriminating against Manuel because of his race.

19. Processing Division is liable for the racial discrimination suffered by Manuel.

20. Manuel has been damaged because of racial discrimination against him by Processing Division. The actions of Processing Division have been a producing and/or proximate cause of Manuel's injuries and damages. Processing Division acted intentionally, with malice or reckless indifference toward Manuel. Because of this, exemplary damages are recoverable for the conduct of Processing Division.

B. Hostile Work Environment

21. Manuel incorporates all other provisions of this pleading by reference and incorporates them herein for all purposes.

22. Processing Division created an unlawful and hostile work environment toward Manuel by regularly forcing him to work harder and longer hours while being paid less than his White counterparts.

23. The acts of Processing Division caused Manuel humiliation and interfered with his ability to perform his duties.

24. The actions of Processing Division in creating this hostile work environment have been a producing and/or proximate cause of Manuel's injuries and damages.

VII.
Damages

25. Manuel was terminated as a direct and proximate result of his complaints regarding his unfair treatment due to the racial discrimination against him by Processing Division. Because of this discrimination by Processing Division, Manuel has suffered extreme mental anguish, emotional distress, and economic loss. Because of the hostility in his work environment, created and precipitated by Processing Division, Manuel has suffered extreme mental anguish and emotional distress. Manuel seeks damages for these injuries in an amount within the Jurisdictional limits of this Court.

VIII.
Exemplary Damages

26. Furthermore, Manuel is entitled to exemplary damages from Processing Division because Processing Division acted with the malice required to support an award of exemplary damages. Processing Division acted with specific intent to cause injury to Manuel because of his race.

IX.
Prayer

Manuel requests that Processing Division answer, and that on final trial Manuel have the following:

a. judgment against Processing Division for actual damages in a sum within the jurisdictional limits of this Court;

b. equitable relief, including, but not limited to, back pay;

c. award of exemplary damages against Processing Division in a sum to be determined by the trier of fact;

d. pre- and post-judgment interest as provided by law;

e. costs of suit, including expert fees;

f. attorney's fees pursuant to Chapter 21 of the Texas Labor Code;

g. such other and further relief to which Manuel may be justly entitled.

Respectfully submitted,

WEST, WEBB, ALLBRITTON, GENTRY & RIFE, P.C.
1515 Emerald Plaza
College Station, Texas 77845

Telephone: 979-694-7000
Facsimile: 979-694-8000

By: /s/ Gaines West
GAINES WEST
State Bar No. 21197500
KRISTINE A. HALE
State Bar No. 24032263

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF CONFERENCE

This is to certify that I received a letter from opposing counsel, Jeffrey C. Londa, counsel of record for Sanderson Farms, Inc. (Processing Division), concerning the filing of the foregoing document. Said opposing counsel suggested filing an Amended Complaint substituting Sanderson Farms, Inc. (Processing Division) for Sanderson Farms, Inc. In this letter opposing counsel indicated he would be unopposed to a Motion for Leave to file such an Amended Complaint, pursuant to the December 20, 2002 agreement on file with the Court. On January 9, 2003, the Court ordered Plaintiff to file an Amended Complaint substituting Sanderson Farms, Inc. (Processing Division) for Sanderson Farms, Inc., thus filing a Motion for Leave is not necessary.

/s/ Gaines West
GAINES WEST

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing document has been HAND DELIVERED on this the 23rd day of January, 2003, to:

Jeffrey C. Londa ***HAND DELIVERY***
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
One Allen Center
500 Dallas Street, Suite 3000
Houston, Texas 77002

/s/ Gaines West
GAINES WEST

OLIVER MANUEL	§	IN THE COUNTY/
	§	DISTRICT COURT
V.	§	BRAZOS COUNTY,
	§	TEXAS
SANDERSON FARMS, INC.	§	_____

FILED
NOV 2 2 2002

PLAINTIFF'S ORIGINAL PETITION AND JURY DEMAND

TO THE HONORABLE COURT:

NOW COMES, OLIVER MANUEL, and files this Original Petition against Sanderson Farms, Inc. ("Sanderson Farms"), and for cause of action would show the Court as follows:

I.
Discovery Level

1. Discovery in this case is intended to be conducted under Level 2 of Rule 190 of the Texas Rules of Civil Procedure.

II.
Parties

2. Plaintiff, OLIVER MANUEL ("Manuel") is a resident of Cobb County, Georgia.

3. Sanderson Farms, Inc. is a corporation incorporated under the laws of the State of Mississippi. Sanderson Farms has its principal place of business in the State of Mississippi. Sanderson Farms may be served with process through its Registered Agent, C.T. Corporation System, 350 North St. Paul Street, Dallas, Texas 75201.

III.
Jurisdiction and Venue

4. The Court has jurisdiction over this matter as Manuel has been damaged in an amount in excess of the minimal jurisdictional limits of the Court.

5. Venue is proper in Bravos County, Texas, pursuant to Section 15.002 of the Texas Civil Practice & Remedies Code because all or a significant part of the causes of action set forth below accrued in Brazos County, Texas.

IV.
Jury Demand

6. Plaintiff demands trial by jury and tenders a jury fee herewith.

V.
Facts

7. Manuel, an African American male, was employed by Sanderson Farms. Manuel was discriminated against based upon his race.

8. Manuel commenced working for Sanderson Farms on April 24, 2000. Manuel was terminated by Sanderson Farms on July 19, 2001.

9. While employed by Sanderson Farms, Manuel held the position of Superintendent Shipping/Preprice/Chilling Department for the second shift from 6:00 o'clock P.M. to 2:30 o'clock A.M.

10. At the time of Manuel's termination, he was the only African American Superintendent employed by Sanderson Farms at the Bryan, Texas processing facility.

11. Manuel was required by Sanderson Farms to work harder and longer hours than similarly situated White employees.

12. Manuel was paid less than similarly situated White employees by Sanderson Farms.

13. Because Manuel complained to Sanderson Farms regarding his unfair employment situation, he was terminated.

VI.

Administrative Prerequisites Satisfied

14. Manuel timely filed a Charge of Discrimination with the Texas Commission on Human Rights ("TCHR").

15. Manuel's timely filed Charge of Discrimination with the TCHR is attached hereto as Exhibit "1."

16. Manuel's Right to Sue Letter from the TCHR is attached hereto as Exhibit "2"

17. This suit is filed within 60 days after receipt of the Right to Sue Letter from TCHR, thus, this suit is timely filed.

VII.
Causes of Action

A. Racial Discrimination

18. Manuel incorporates all other provisions of this pleading by reference and incorporates them herein for all purposes.

19. Sanderson Farms has violated Chapter 21 of the Texas Labor Code by discriminating against Manuel because of his race.

20. Sanderson Farms is liable for the racial discrimination suffered by Manuel.

21. Manuel has been damaged because of racial discrimination against him by Sanderson Farms. The actions of Sanderson Farms have been a producing and/or proximate cause of Manuel's injuries and damages. Sanderson Farms acted intentionally, with malice or reckless indifference toward Manuel. Because of this, exemplary damages are recoverable for the conduct of Sanderson Farms.

B. Hostile Work Environment

22. Manuel incorporates all other provisions of this pleading by reference and incorporates them herein for all purposes.

23. Sanderson Farms created an unlawful and hostile work environment toward Manuel by regularly forcing him to work harder and longer hours while being paid less than his White counterparts.

24. The acts of Sanderson Farms caused Manuel humiliation and interfered with his ability to perform his duties.

25. The actions of Sanderson Farms in creating this hostile work environment have been a producing and/or proximate cause of Manuel's injuries and damages.

VIII.
Damages

26. Manuel was terminated as a direct and proximate result of his complaints regarding his unfair treatment due to the racial discrimination against him by Sanderson Farms. Because of this discrimination by Sanderson Farms, Manuel has suffered extreme mental anguish, emotional distress, and economic loss. Because of the hostility in his work environment, created and precipitated by Sanderson Farms, Manuel has suffered extreme mental anguish and emotional distress. Manuel seeks damages for these injuries in art amount within the jurisdictional limits of this Court.

IX.
Exemplary Damages

27. Furthermore, Manuel is entitled to exemplary damages from Sanderson Farms because Sanderson Farms acted with the malice required to support an award of exemplary damages. Sanderson Farms acted with specific intent to cause injury to Manuel because of his race.

X.
Prayer

Manuel requests that Sanderson Farms be cited to appear and answer, and that on final trial Manuel have the following:

a. judgment against Sanderson Farms Processing Division for actual damages in a sum within the jurisdictional limits of this Court;

b. equitable relief, including, but not limited to, back pay;

c. award of exemplary damages against Sanderson Farms in a sum to be determined by the trier of fact;

d. pre- and post-judgment interest as provided by law;

e. costs of suit, including expert fees;

f. attorney's fees pursuant to Chapter 21 of the Texas Labor Code;

g. such other and further relief to which Manuel may be justly entitled.

Respectfully submitted,

WEST, WEBB, ALLBRITTON, GENTRY & RIFE, P.C.
1515 Emerald Plaza
College Station, Texas 77845
Telephone: 979-694-7000
Facsimile: 979-694-8000

/s/ Gaines West
GAINES WEST
State Bar No. 21197500
KRISTINE A. HALE
State Bar No. 24032263

ATTORNEYS FOR PLAINTIFF

CHARGE OF DISCRIMINATION This form is affected by the Privacy Act of 1974; See privacy Act Statement before completing this Form.	AGENCY [X] FEPA [ ] EEOC	CHARGE NUMBER

Texas Commission On Human Rights and EEOC

State or local Agency, if any

Name *(Indicate Mr., Ms., Mrs.)*	*Home Tel. (Include Area Code)*
Mr. Oliver Manuel	(979) 574-7534

Street Address	City, State & Zip	Date of Birth
403 Park St.	College Station, TX 77840	02/02/1961

Named is the Employer, Labor Organization, Employment Agency Apprenticeship Committee, State or Local Government Agency who Discriminated against Me (If more than one list below.)

Name	No. of Employees Members	Tel. No. *(Include Area Code)*
Sanderson Farms	Cat A (15-100)	(979) 361-3410
Street Address	**City, State & Zip**	**County**
2000 Shiloh Drive	Bryan, TX 77803	041

Name	Tel. No. *(Include Area Code)*

Street Address	City, State & Zip	County

Cause of Discrimination Based on (Check appropriate box(es))	**Date Discrimination Took Place**
☒ Race ☐ Color ☐ Sex ☐ Religion ☐ Natl. Origin ☐ Retaliation ☐ Age ☐ Disability ☐ Other *(Specify)* *Tchr Act*	Earliest Latest 07/19/2001 07/19/2001 ☐ *Continuing Action*

THE PARTICULARS ARE (*If additional space is needed, attach extra sheet*(s)):

Original received September 7, 2001,

I. PERSONAL HARM:

1. During my employment, I was subjected to different terms and conditions of employment than similarly-situated White employees.

2. During my employment, my pay was not equal to the pay of similarly-situated White employees.

3. On/around July 19, 2001, I was discharged from my position as Superintendent.

II. RESPONDENT'S REASON FOR ADVERSE ACTION:

1. No reason given.
2. No reason given.
3. I was informed by /s/David Jarrett (name), Manager (title), that I was being terminated because Misconduct.

III. DISCRIMINATION STATEMENT:

I believe that I have been discriminated against based on my race, Black, In violation of the Texas Commission

on Human Rights Act, as amended and Title VII of the Criminal Rights Act of 1964, as amended; inasmuch as:amended; inasmuch as:

** Text is Continued on Attached Sheet(s) **

I want this charge filed with both the EEOC and the State or local Agency, if any. I will Advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures.	Notary (When necessary for State and Local Requirements) ✔ I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.
I declare under penalty of perjury that the foregoing is true and correct /s/ 2-20-02	**Signature of Complaint** /s/ illegible Subscribed and Sworn to Before Me This Date (month, day and year) ✔

EXHIBIT "1"

6330 Highway 290 E Suite 250
Austin, TX 78723
P0 Box 13006
Austin, TX 78711-3006
www.tchr.state_Tx.us

(512) 437-3450
(512) 437-3478
(888) 452-4778 Toll Free
(612) 371-7473 TTY
(800) 735-2989 Texas Relay

TEXAS COMMISSION ON HUMAN RIGHTS
NOTICE OF RIGHT TO FILE A CIVIL ACTION

RE: Oliver Manuel v. Sanderson Farms

TCHR Complaint Number: 1A20192-S

EEOC Complaint Number: 34CA200423

Pursuant to Sections 21.252 and 21.254 of the Texas Labor Code, as amended, and Chapter 327, Section 327.7 of the Commission's Rules, This notice is to advise you of your right to bring a private civil action in state court in the above referenced case. PLEASE BE ADVISED THAT YOU HAVE SIXTY (60) DAYS FROM THE RECEIPT OF THIS NOTICE TO FILE THIS CIVIL ACTION.

The United States Supreme Court has held in Kremer v. Chemical Construction Corporation, 456 U. S. 461 (1982), that a federal district court must generally dismiss a Title VII action involving the same parties and raising the same issues as those raised in a prior state court action under Chapter 21 of the Texas Labor Code. Therefore, filing a lawsuit in state court based on the issuance of this notice of right-to-sue may prevent you from filing a lawsuit in federal court based on Title VII of the Civil Rights Act

of 1964, as amended, 42 U. S. C. 2000e - et seq.

Sincerely,

/s/_____
J.D. Powell
Executive, Director

c: Sanderson Farms
C/o Jeffrey C. Londa, Attorney
500 Dallas St., Suite 3000
Houston, TX 77002

"Texas *Commission on Human Rights is an Equal Opportunity Employer*"

EXHIBIT "2"

(2)

Supreme Court, U.S.
FILED
JUL 14 2004
OFFICE OF THE CLERK

No. 03-1702

IN THE

Supreme Court of the United States

OLIVER MANUEL,

Petitioner,

v.

SANDERSON FARMS INC. (PROCESSING DIVISION),

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

JEFFREY C. LONDA
Counsel of Record
STEPHEN E. HART
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
500 Dallas Street
Suite 3000
Houston, TX 77002-4709
(713) 655-0855

Attorneys for Respondent

188453

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether every lawsuit that asserts a claim for alleged employment discrimination solely under a state employment discrimination statute states a claim under an analogous federal employment discrimination statute, simply because the plaintiff could have (but did not) allege a violation of the federal statute, and despite the fact that the plaintiff's pleading specifically and unequivocally states that plaintiff is only asserting a claim for alleged violation of the state employment discrimination statute?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Sanderson Farms Inc. (Processing Division) is wholly owned by Sanderson Farms, Inc.

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STATEMENT OF THE CASE

Petitioner filed "Plaintiff's Original Petition and Jury Demand" on November 22, 2002, in the County Court of Law No. 2 of Brazos County, Texas. (Petitioner's Appendix at A-24). On December 18, 2002, Petitioner's lawsuit was timely removed to the United States District Court for the Southern District of Texas, Houston Division, on grounds of diversity jurisdiction. On January 23, 2003, Petitioner filed "Plaintiff's First Amended Complaint and Jury Demand." (Petitioner's Appendix at A-15). In his lawsuit, Petitioner asserted claims for alleged racial discrimination solely under the Texas Commission on Human Rights Act ("TCHRA"), TEX. LAB. CODE ANN. § 21.051. (Petitioner's Appendix at A-15 through A-30). Petitioner did *not* assert any claims under Title VII of the Civil Rights Act of 1964, as amended ("Title VII"). To the contrary, Petitioner's Original Petition and Jury Demand, which was filed in state court, stated that Petitioner was suing for alleged violations of the TCHRA, and it did not mention Title VII or the Equal Employment Opportunity Commission ("EEOC") (Petitioner's Appendix at A-27). Further, in Petitioner's First Amended Complaint and Jury Demand, which was filed in federal court, Petitioner expressly stated: "In his Original Petition . . . **Plaintiff alleged *only* state causes of action under the Texas Commission on Human Rights Act ("TCHRA")** for race discrimination and hostile work environment." (Petitioner's Appendix at A-16) (emphasis added). In the amended complaint, Petitioner also stated: **"Manuel does not concede that this Court has jurisdiction over this lawsuit."** (Petitioner's Appendix at A-16) (emphasis added).

Pursuant to an order issued by the District Court, Respondent Sanderson Farms Inc. (Processing Division)

("Sanderson Farms") filed its Motion for Summary Judgment on March 21, 2003. In its motion, Sanderson Farms argued that Petitioner's claims were time-barred under Texas law and that they failed on the merits. The District Court granted Sanderson Farms' motion. (Petitioner's Appendix at A-1 through A-4). On appeal, the Fifth Circuit affirmed the judgment of the District Court, ruling that Petitioner's claims were time-barred under Texas law because Petitioner had failed to file his Charge of Discrimination with the TCHR within 180 days of the allegedly discriminatory acts. (Petitioner's Appendix at A-5 through A-12).[1] Petitioner does not challenge the Fifth Circuit's ruling that his TCHRA claims were time-barred under Texas law.

---

1. A person alleging employment discrimination under the TCHRA must file a complaint with the TCHR within 180 days after the alleged discriminatory act occurred. *See* TEX. LAB. CODE ANN. § 21.202(a) ("A complaint under this subchapter must be filed not later than the 180th day after the date the alleged unlawful employment practice occurred."); *Specialty Retailers, Inc. v. DeMaranville*, 933 S.W.2d 490, 492 (Tex. 1996). The 180 day time limit for filing a complaint with the TCHR is *mandatory* and *jurisdictional*. *See Specialty Retailers, Inc.*, 933 S.W.2d at 492. Therefore, employment discrimination claims brought under the TCHRA are time-barred when a complaint is filed with the TCHR after the 180 day deadline. *Pope v. MCI Telecommunications Corp.*, 937 F.2d 258, 263-64 (5th Cir. 1991), *cert. denied*, 504 U.S. 916 (1992).

REASONS FOR DENYING THE PETITION

I. Petitioner's Pleadings Do Not State A Claim Under Title VII.

In his Petition, Petitioner does not challenge the Fifth Circuit's ruling that his TCHRA claims were time-barred under Texas law. Instead, Petitioner asserts that the Fifth Circuit erred by "ignoring" his "Title VII" claims and by affirming the District Court's judgment solely on grounds that he had failed to comply with time limitations for filing a charge of discrimination under the TCHRA. In this regard, Petitioner contends his "well-pleaded complaint" stated a claim under Title VII merely because it alleged facts that could have supported a Title VII claim, even though Petitioner's operative pleading: (1) specifically stated that Petitioner "only" alleged claims under the TCHRA; (2) did not mention Title VII; and (3) stated that Petitioner did not concede that the District Court had jurisdiction.[2] (Petitioner's Appendix at A-16, A-27).

Petitioner's assertion is not correct. "The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists *only* when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (emphasis added). A plaintiff is the "master of the claim" and "he or she may avoid federal [question] jurisdiction by exclusive reliance on state law." *Id.*

2. If Petitioner had been pursuing federal Title VII claims as well as state law TCHRA claims, there would be no basis for his refusal to concede that the District Court had jurisdiction because it is self-evident that federal courts have jurisdiction over lawsuits that assert violations of federal statutes. *See* 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

Accord Carpenter v. Wichita Falls Independent School District, 44 F.3d 362, 366 (5th Cir. 1995) ("[a] plaintiff with a choice between federal- and state-law claims may elect to proceed in state court on the exclusive basis of state law."). Moreover, "[j]urisdiction may not be sustained on a theory that the plaintiff has not advanced." *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 809 n.6 (1986). Thus, the mere fact that Petitioner's First Amended Complaint and Jury demand alleges facts that could have supported a Title VII claim is not sufficient to stated a claim under Title VII. *See Rains v. Criterion Sys., Inc.*, 80 F.3d 339, 344 (9th Cir. 1996) ("That the same facts could have been the basis for a Title VII claim does not make Rains' wrongful termination claim into a federal cause of action. Rains chose to bring a state claim rather than a Title VII claim, and was entitled to do so."); *accord Easton v. Crossland Mortgage Corp.*, 114 F.3d 979, 982 (9th Cir. 1997) (holding that a complaint which alleged state law claims and sought state law remedies did not state a claim arising under Title VII, even though the complaint included incidental references to Title VII); *Broce v. ARCO Pipe Line Co.*, 28 Fed. Appx. 653, 654-55 (9th Cir. 2002) (holding that a claim alleging veteran status discrimination under state law did not state a claim under federal law); *Willy v. Coastal Corp.*, 855 F.2d 1160, 1170 (5th Cir. 1988) (holding that a state law wrongful discharge claim which could have supported a claim for alleged violation of federal whistleblower statutes did not arise under federal law).[3]

---

3. *See also Knestrick v. IBM Corp.*, 945 F. Supp. 1080, 1081-82 (E.D. Mich. 1996) (holding that a lawsuit filed in state court for

(Cont'd)

In support of his meritless argument, Petitioner cites several cases for the proposition that a party need not name the correct legal theory to state a claim for alleged violation of federal law. The cases cited by Petitioner are inapposite. None of those cases hold that a state law action, filed in state court, which only asserts state law claims, states a claim for alleged violation of a federal statute merely because it is based on alleged facts that could support a claim for alleged violation of a federal statute. Indeed, *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), which Petitioner cites in support of his contention that a party need not name the correct legal theory, actually contradicts Petitioner's position. In *Simonton*, the plaintiff filed an action under Title VII, alleging that he was subjected to discrimination and harassment based on his sexual orientation. *Id.* at 34. Inasmuch as Title VII does not provide a cause of action for discrimination based on sexual orientation,[4] the district court dismissed the action for failure to state a claim. On appeal, the plaintiff argued that his lawsuit stated a claim under Title VII because it could be construed as a claim for sex discrimination. The Fourth Circuit rejected the plaintiff's argument. Although it noted the general rule that a party need not assert the correct legal theory, the court observed that the plaintiff's complaint unequivocally and

(Cont'd)
alleged violation of Michigan's employment discrimination statute did not state a claim for alleged violation of Title VII); *Pointer v. Crown Cork & Seal Co., Inc.*, 791 F. Supp. 164, 166-67 (S.D. Tex. 1992) (holding that a lawsuit filed in state court for alleged violation of the TCHRA did not state a claim for alleged violation of Title VII, despite the fact that plaintiff had previously filed a lawsuit in federal court for alleged violation of Title VII based on the same alleged facts).

4. *See, e.g., Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996).

specifically alleged only sexual orientation discrimination. *See id.* at 37 ("there is no basis to infer from the complaint that the harassment Simonton suffered was because of his sex and not, *as he urges throughout his complaint*, because of his sexual orientation.") (emphasis added). Therefore, the appellate court affirmed the trial court's dismissal of the plaintiff's lawsuit. *Id.* at 38. Likewise, as explained above, Petitioner specifically alleged that his claims *only* arose under the TCHRA. (Petitioner's Appendix at A-16). Consequently, there is simply no basis for Petitioner's assertion that his lawsuit arises under Title VII.

The cases cited by Petitioner are also inapplicable because Petitioner did not name an "incorrect" legal theory in his complaint. Rather, the TCHRA *is* a correct legal theory because it prohibits employment discrimination and provides remedies to aggrieved individuals. *See* TEX. LAB. CODE ANN. §§ 21.051, 21.258, 21.2585, and 21.259. The fact that Petitioner's TCHRA claim was barred by limitations does not make it an "incorrect" legal theory. The Fifth Circuit implicitly recognized that fact in *Pope*, when it held that a plaintiff's TCHRA claim was barred by limitations even though an identical claim would have been timely had it been brought under Title VII. *See Pope*, 937 F.2d at 264.

Petitioner also erroneously asserts that the Fifth Circuit's decision contradicts *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002), by requiring a "heightened" standard of pleading for federal employment discrimination claims. According to Petitioner, the Fifth Circuit required this "heightened" standard of pleading by implicitly requiring that his complaint identify Title VII in order to state a claim under Title VII. Petitioner's argument is ludicrous. *Swierkiewicz* is completely inapplicable to this case. In *Swierkiewicz*,

the issue was "whether a complaint in an employment discrimination lawsuit must contain specific facts establishing a prima facie case of discrimination under the framework set forth by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 668 (1973)." *Swierkiewicz*, 534 U.S. at 508. This Court held that an employment discrimination plaintiff need not allege specific facts supporting a prima facie case under the *McDonnell Douglas* framework in order to state claims under Title VII or the Age Discrimination in Employment Act ("ADEA"). *Id. Swierkiewicz* provides absolutely no support for Petitioner's assertion that a complaint states a claim under Title VII where it: (1) does not mention Title VII; and it (2) expressly states that it is *only* asserting claims under a state employment discrimination statute, as Petitioner's First Amended Complaint and Jury Demand stated in this case. Indeed, the plaintiff in *Swierkiewicz* specifically alleged that his lawsuit was being brought under Title VII and the ADEA. *Id.* at 509, 514. Accordingly, Petitioner's assertion that the Fifth Circuit's decision in this case contradicts *Swierkiewicz* has absolutely no merit.

II. Acceptance Of Petitioner's Contentions Would Eviscerate The Well Pleaded Complaint Rule And Make Virtually Every Lawsuit Removable To Federal Court.

In his Petition, Petitioner correctly notes that many states have adopted employment discrimination laws that mirror their federal counterparts. Petitioner also correctly notes that, as a result of the similarity in state and federal employment discrimination statutes, the same factual allegations may often support claims under both state law and federal statutes such as Title VII. What Petitioner apparently fails to understand is that acceptance of his argument would result

in the complete destruction of the well pleaded complaint rule and it would make *every* employment discrimination lawsuit removable to federal court. Likewise, even outside the context of employment discrimination, every state court lawsuit would be removable to federal court where federal law and state law provided for similar causes of action. Plaintiff has provided absolutely no justification for such a revolutionary revision of this Court's precedents regarding federal question jurisdiction.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

JEFFREY C. LONDA
Counsel of Record
STEPHEN E. HART
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
500 Dallas Street
Suite 3000
Houston, TX 77002-4709
(713) 655-0855

Attorneys for Respondent